United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1008

To be argued by
JAMES B. M. MCNALLY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

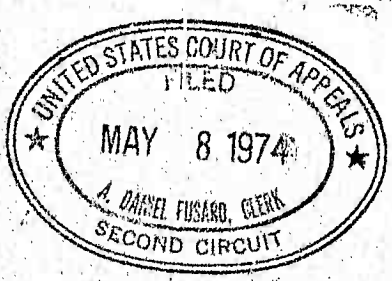
BLH, INCORPORATED,
Plaintiff-Appellee,

against

HODGE & HAMMOND, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEE'S BRIEF



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BLH, INCORPORATED,
Plaintiff-Appellee,

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HODGE & HAMMOND, INC.,
Defendant-Appellant.

Statement of the Issues Pursuant to Rule 28(a)(2)

1. Was defendant-appellant principal or agent in the transaction alleged in the second count of the complaint?

2. Is the order denying in part appellant's motion for a stay and other relief a proper exercise of discretion?

Preliminary Statement

(The parenthetical references are to the Appendix, unless otherwise indicated.)

Appeal from an order of Metzner, United States District Judge, granting plaintiff-appellee summary judgment on the second cause of action for the sales price of the 6,000 pound asphalt plant (small plant).

This action is for the sales price of a 6,000 pound asphalt plant (small plant) and the balance of the sales price of a 10,000 pound asphalt plant (large plant). Plaintiff's motion for summary judgment was granted as to the small plant and denied as to the large plant. Plaintiff does not appeal the denial.

February 3, 1971, plaintiff, by written contract, sold the small plant to defendant. The agreed price was $218,429.30. No part thereof has been paid.

A written document between plaintiff and defendant sets forth the defendant has the right to purchase certain products, including the small plant, at discount prices, but in resale defendant acts as independent contractor, not as agent of plaintiff.

Paragraph 20 of the Distributor's Agreement provides (44a):

> "INDEPENDENT CONTRACTOR: Distributor shall at all times act as independent contractor and shall not transact any business in the name of the Company, or obligate the Company in any manner, character, or description. This Agreement shall not be construed as constituting Distributor as an employee or agent of the Company for any purposes whatsoever, and the Agreement does not vest Distributor with the power or authority to make adjustments with customers on behalf of the Company or otherwise bind or obligate the Company in any respect whatsoever."

Paragraph 25 of the said agreement proscribes alteration or enlargement thereof, except in writing signed by the parties thereto.

Under a separate written contract to which plaintiff is not a party, defendant resold the small plant to a third party, Lizza Industries (Lizza), for $236,689.50, which was $18,000 more than defendant's purchase price from plaintiff.

The small plant was delivered and accepted and has been operating for three years. No complaint has been made about it.

Defendant has received $8,000 partial payment from the purchaser Lizza, on the resale of the small plant. Defendant has made no payment to the plaintiff for the small plant.

In or about August, 1970, plaintiff, by written contract, sold to defendant a 10,000 pound asphalt plant (large plant) for $412,161.

By written contract to which plaintiff is not a party, defendant resold the large plant to Lizza for $470,000, about $58,000 more than defendant's purchase price from plaintiff.

The large plant was delivered and accepted and has been operating for three years. Defendant made partial payments thereon but still owes the plaintiff $74,871.45. Defendant has received $366,000 thereon from Lizza. Defendant claims Lizza still owes $90,484.85.

Plaintiff commenced this action January 3, 1973 to recover the balance due on the large plant, and the total price of the small plant. In or about June, 1972, Lizza served defendant a summons, without complaint, in an action in the Supreme Court, Nassau County. Plaintiff was named a defendant in the said action. Lizza failed to proceed in the Nassau County action. When this action was commenced on January 3, 1973, Lizza was in default for failure to serve a complaint in the Nassau County action.

It was the commencement of this action by this plaintiff against defendant that prompted Lizza and defendant to proceed with the Nassau County action above referred to. The complaint therein is verified January 23, 1973, twenty days after the commencement of this action.

Defendant, Hodge & Hammond, was in-pocket $8,000 on the small plant, and about $29,000 on the large plant. Lizza has been operating both plants for two years and owed about $90,000 on the large plant, and $229,000 on the small plant. On the other hand, plaintiff has delivered both plants and is owed about $218,000 on the small plant, and about $75,000 on the large plant for two years prior to the commencement of this action. With high prime interest rates, and high effective bank rates and required bank balances, it was in the financial interest of defendant and Lizza to delay payment as long as possible. This is what has been done in this case.

Statement of the Case and Relevant Facts

February 3, 1971, plaintiff sold the small plant to defendant (76a). The second count in the complaint is for the sales price thereof, $218,429.30. No part thereof has been paid. Lizza's complaint in the Nassau County action does not complain of the small plant (13a).

Defendant's answer in the Nassau County action counterclaims against Lizza for the balance on the resale of the small plant (57a, ¶¶23-27).

Defendant's answer herein fails to deny the allegations of the complaint, thereby admitting the sale of the small plant and non-payment of the sales price (8a).

Defendant did not respond to plaintiff's 9(g) statement, thereby conceding the sale and non-payment of the price of the small plant (68a).

Defendant's affirmative defense admits "the transactions" involving "the sale of two asphalt plants to Lizza Industries, Inc. . . ." However, it alleges "the defendant served as an exclusive sales agent" for the plaintiff.

Invoice No. 058476 for $218,429.30 was rendered to defendant (60a). Defendant resold the plant to Lizza. Defendant's answer in the Nassau County action counterclaims against Lizza for the balance on the resale of the small plant (57a, ¶¶23-27).

Plaintiff sold the large plant to defendant for $412,161 (48a). Defendant resold the same plant to Lizza for $470,000 (17a, 18a).

In May, 1972, Lizza instituted an action by service of a summons in the Supreme Court, Nassau County, against plaintiff and defendant. Lizza's complaint, not served until January 23, 1973, claims damages for $500,000 for alleged breach of warranty on the sale of the large plant. Lizza's complaint does not involve the small plant (13a-16a).

Defendant's answer in the Nassau County action is dated February 21, 1973, after the commencement of this action on January 3, 1973 (59a, 1a). Defendant's answer alleges a counterclaim against Lizza for the balance due on the resale of the small plant of $228,698.50. This is the only mention of the small plant in the Nassau County action and then only by Hodge & Hammond's counterclaim against Lizza for the balance of the resale price. There is no pending claim against the plaintiff relative to the small plant in the Nassau County litigation.

The two transactions on which the complaint herein is grounded are covered by a Distributor's Agreement dated March 15, 1969, amended August 1, 1970 (44a). Thereby plaintiff granted the defendant the right to "purchase for resale" machinery manufactured and produced by plaintiff including asphalt plant equipment.

Paragraph 20 of the Distributor's Agreement provides (44a):

> "INDEPENDENT CONTRACTOR: Distributor shall at all times act as independent contractor and shall not transact any business in the name of the Company, or obligate the Company in any manner, character, or description. This Agreement shall not be construed as constituting Distributor as an employee or agent of the Company for any purposes whatsoever, and the Agreement does not vest Distributor with the power or authority to make adjustments with customers on behalf of the Company or otherwise bind or obligate the Company in any respect whatsoever."

Paragraph 25 of the said agreement proscribes alteration or enlargement thereof, except in writing signed by the parties thereto.

The purchase orders for the two plants were placed by defendant, Hodge & Hammond (48a, 76a). The confirmations of the purchase orders were from plaintiff to the defendant (48a, 76a). The invoices for the two machines were rendered by plaintiff, BLH, to the defendant, Hodge & Hammond (60a). Payments on account of the 10,000 pound machine were made by defendant, Hodge & Hammond, to plaintiff, BLH (6a, 68a).

The resales of the two machines to Lizza are evidenced by purchase orders from Lizza to the defendant, Hodge & Hammond (17a, 57a). The sales price to Lizza in each case was in excess of the sales price thereof by BLH to the defendant, Hodge & Hammond. Invoices were rendered by the defendant, Hodge & Hammond, to Lizza (17a). Payments for the two machines were made by Lizza to the defendant (55a, 58a).

Plaintiff, in support of its motion for summary judgment, pursuant to Rule 9(g) of the Rules of the United States District

Court, Southern District of New York, alleged there are no genuine issues as to the Distributor's Agreement, and the amendment thereof; the purchase orders for the two machines; the sales price of each; the balance of $74,871.45 due on the 10,000 pound asphalt plant; and, the sum of $218,429.30 due on the 6,000 pound plant (68a).

Defendant did not respond to the 9(g) statement. Said rule deems admitted the facts to which no response is made.

The answering affidavit of Lewis Hammond, Jr., president of the defendant, Hodge & Hammond, relates wholly and solely to the sale of the 10,000 pound plant (large plant). His bare conclusory legal allegations with reference to agency are unsupported by any facts and contrary to and in conflict with the undisputed documentary evidence.

Hammond's affidavit is limited to the 10,000 pound machine. The affidavit identifies the machine as one in which Lizza "indicated an interest in the purchase of an asphalt plant in the Spring of 1970" (65a). The purchase order for the 10,000 pound machine was placed by Lizza with the defendant on July 30, 1970 (17a). The transaction for the 6,000 pound machine occurred in 1971 (76a). Moreover, Lizza's complaint for breach of warranty is limited to the 10,000 pound machine (13a-16a).

Hammond's affidavit does not deny the underlying transactions; it simply characterizes them as transactions with respect to which defendant was plaintiff's agent.

It is conceded that plaintiff submitted in support of its motion for summary judgment the wrong purchase order for the 6,000 pound machine (52a). The defendant relies on this transaction in its counterclaim against Lizza in the Nassau County action and sets it forth in paragraph 23 of its answer and counterclaim (57a):

> "AS AND FOR AN ADDITIONAL COUNTER-CLAIM AGAINST THE PLAINTIFFS
>
> 23. The defendant Hodge & Hammond Inc. repeats and realleges that on January 28, 1971 plaintiff Lizza Industries, Inc. entered into an agreement with Hodge & Ham-

mond, Inc. acting as an agent for disclosed principal Baldwin-Lima-Hamilton Corporation for the purchase of a BLH 6000 lb. Madsen Asphalt Plant at a purchase price of $296,408. A copy of that agreement is annexed hereto and made a part hereof.

24. That thereafter certain modifications to the purchase order were entered into between the plaintiff Lizza Industries, Inc. and the defendant Hodge & Hammond, Inc. under which plaintiff's order for a dust collector for the asphalt plant was cancelled.

25. That on or about May 19, 1971 the said asphalt plant was delivered to the plaintiff and accepted by the plaintiff.

26. That pursuant to the agreements entered into between the plaintiff and the defendant Hodge & Hammond, Inc. the plaintiff Lizza Industries, Inc. is indebted to the defendant Hodge & Hammond, Inc. in the sum of $236,698.50.

27. That no part of said sum has been paid except the sum of $8,000 leaving a balance due defendant Hodge & Hammond, Inc. in the sum of $228,698.50 together with interest, costs, and disbursements of this action."

The defendant for the first time adverted to a wrong purchase order Exhibit D upon service of its supplemental memorandum in support of its motion to reargue the motion for and order of Metzner, D. J., granting summary judgment for the price of the small plant.

The opinion of Metzner, D. J., on defendant's motion for reargument disposes of defendant's contention as follows (72a):

> "It is perfectly clear that defendant was not misled by the inadvertent submission of the wrong contract. In fact the contract now submitted to the Court as exhibit D is referred to in defendant's counterclaim in the State Court action. Furthermore, the 9(g) statement setting forth the sales price for the machine was not denied by the defendant."

The substitution of the proper purchase order for the 6,000 pound machine was well within the discretion of the Court. The

defendant could not be and was not misled or prejudiced. The transactions set forth in plaintiff's complaint stand admitted and are supported in every detail by the documentary proof set forth in the record.

POINT I

There are no issues of fact that require trial.

Defendant (Br. 5, 6) states:

> "The record below clearly reveals issues of fact which should have been resolved at plenary trial: (1) The status of the parties; (2) delivery and acceptance; (3) compliance with the purchase orders.
>
> The court below found that H & H purchased the plants from BLH as an independent contractor pursuant to the terms of an agreement entered into between the parties some two years prior to the purchase (35a)."

The statement that the agreement was made "some two years prior to the purchase" is inaccurate and misleading. That agreement, dated March 15, 1969, was reaffirmed by an amendment in writing, signed by the parties on August 1, 1970 (44a, Amendment). The amendment was just before the sale of the first large plant by plaintiff to defendant under a written contract (48a). Thus immediately prior to the sale to defendant it agreed it "shall at all times act as independent contractor and shall not transact any business in the name of the Company [BLH], or obligate the Company [BLH] in any manner, character or description." (44a, p. 4, ¶20)

The affidavit of Louis Hammond, Jr., which is quoted in part by defendant (Br. p. 6), raises no factual issues. It contains nothing more than the bare legal conclusion that the relationship between plaintiff and defendant was that of "manufacturer and salesman". No facts are stated to support that legal conclusion. The written agreement, dated March 15, 1969, and reaffirmed by amendment in writing, dated August 1, 1970, at the very time of

the first transaction, provides "this agreement cannot be altered or enlarged except in writing signed by both parties" (44a, ¶25). Defendant makes no claim any such writing exists. Indeed, defendant submits no facts, either oral or in writing, to support defendant's legal conclusion that defendant was not an independent contractor.

Moreover, the statements in the Hammond affidavit refer only to the large plant, not to the small plant for whose purchase price summary judgment was granted.

Defendant (Br. p. 5) states that "delivery and acceptance" are "issues of fact which should have been resolved at plenary trial". No such factual issue exists.

Defendant's order No. S 5551 for the small plant directs that the plant be shipped to defendant in care of Lizza Industries, Inc., Hicksville, L. I., N. Y. (76a). Plaintiff's contract, dated February 3, 1971, for the small plant, accepts that purchase order No. S 5551 and that letter-contract in turn is accepted in writing by defendant on February 19, 1971. It confirms that the delivery of the small plant is to be made to Lizza Industries, Inc. This is confirmed, also, by the affidavit of Louis Hammond, Jr., an officer of defendant, who states (66a) that delivery was made directly to Lizza Industries, Inc. Moreover, defendant has stated in the Nassau County action: "That on or about May 19, 1971, the said asphalt plant (the small plant) was delivered to the plaintiff (Lizza) and accepted by plaintiff (Lizza)" (58a, ¶25). Defendant's answer herein is to the same effect (9a, ¶6). Therefore, no issue of fact as to the delivery and acceptance of the small plant is presented.

Defendant (Br. p. 2) states defendant in the Nassau County action "interposed counterclaims and cross-complaints in its answer relating to both asphalt plants." That statement is plainly wrong and misleading. Defendant interposed no "cross-complaint" in its answer relating to the small plant; defendant asserted a counterclaim against Lizza Industries, Inc., for $228,689.50, the balance of the sales price of the small plant in the resale of the plant by defendant to Lizza (57a, 58a). This

is confirmed by defendant's answer herein which specifically so states (9a, ¶4).

The only controversy in this case, if any, relates solely to the large plant.

POINT II

Plaintiff sold the small plant to the defendant.

The defendant's answer does not deny the sale and delivery of the small plant. The defendant confirms the sale and delivery of the small plant. Paragraph 2 of its answer (8a) alleges "The transactions complained of in plaintiff's complaint involve the sale of two asphalt plants to Lizza . . ." However, it alleges "the defendant served as an exclusive agent" for the plaintiff.

Rule 8(d) FRCP provides as follows:

> "EFFECT OF FAILURE TO DENY. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. . . ."

The transactions alleged in the complaint having been admitted, are not in issue.

Moore v. *Linaham,* 117 F. 2d 140, 142—2nd Cir.
Peoples Natural Gas Co. v. *Federal Powers Commission,* 127 F. 2d 153, 156—C. A. Dist. of Col.
Scholl v. *Scholl,* 152, F. 2d 672, 674—C. A. Dist. of Col.
Fontes v. *Porter,* 156 F. 2d 956, 957—9th Cir.
McComb v. *Blue Star Auto Stores,* 164, F. 2d 329, 331—7th Cir.
Atkinson v. *Atkinson,* 167 F. 2d 793, 795, 7th Cir.
Campbell v. *Campbell,* 170 F. 2d 809—C. A. Dist. of Col.
Sinclair Refining Co. v. *Howell,* 222 F. 2d 637, 639, 5th Cir.

Alloy Products Corp. v. *U. S.*, 302 F. 2d 528, 531, U. S. Ct. of Claims
U. S. v. *Merritt-Chapman & Scott Corp.*, 305 F. 2d 121, 123—3rd Cir.

Defendant's answer and Hammond's affidavit in opposition to the motion for summary judgment that "the relationship between Baldwin-Lima-Hamilton Corporation and Hodge & Hammond for the purpose of the sale of asphalt plants was strictly one of manufacturer and salesman" (66a, ¶7) are bare, legal conclusions without factual support.

As between principal and agent, the agency is required to be established by agreement and consent; the appearance to a third person is irrelevant on the existence of the agency as between the principal and the agent.

2A CJS Agency, Sec. 52, p. 627

A. L. I., Restatement of the Law of Agency, 2d, Sec. 1

It is immaterial that Lizza in the Nassau County action alleges or claims the defendant herein was the apparent agent of this plaintiff.

In the instant case, the status of the parties is defined by the Distributor's Agreement, which is admitted. The Distributor's Agreement proscribes any modification unless in writing and signed by the parties. An oral modification is inadmissible.

Northern Assurance Co. v. *Grand View Building Association*, 183 U. S. 308, 318;
Bushwick-Decatur Motors v. *Ford Motor Co.*, 30 F. S. 917, aff'd 116 F. 2d 675, 2 Cir.

Defendant has not factually supported its claim of agency.

The undisputed documentary evidence clearly establishes the defendant purchased the two asphalt plants as principal. The Distributor's Agreement expressly provides the defendant is an independent contractor and not plaintiff's agent. The purchase

orders are defendant's; plaintiff rendered its invoices to defendant; defendant paid plaintiff. There is no purchase order from Lizza to plaintiff. Lizza made no payments to plaintiff on account of the two plants. Defendant sold the plants to Lizza at a profit. The purchase orders of Lizza ran to defendant, Hodge & Hammond. Lizza made payments to the defendant. Moreover, Lizza made a payment of $8,000 on account of the 6,000 pound machine and defendant made no payment thereon to the plaintiff.

POINT III

The disposition of defendant's motion to join necessary parties and for other relief was proper and did not prejudice any substantial rights of the defendant.

The judgment stays the first cause of action on the large plant pending disposition of the action in the Supreme Court, Nassau County (78a). Plaintiff in that action seeks damages for breach of warranty in the sale thereof. If said plaintiff recovers, defendant herein claims over against this plaintiff. Plaintiff in the Nassau County action makes no claim as to the small plant. Hence, there is no basis for a claim over in the Nassau County action on the small plant. The stay of the first cause of action on the large plant, afforded this defendant all the relief it was entitled to.

The Nassau County action did not involve the small plant until this defendant interposed its answer dated February 21, 1973 including its counterclaim based thereon. This action was commenced prior thereto, on January 3, 1973. There is no factual or legal basis for a stay of the action on the small plant commenced in this court prior to defendant's counterclaim thereon in the Nassau County action.

To the extent the relief sought by this defendant as to the second cause was denied, no substantial right of the defendant was affected. See concurring opinion, *L. Hand, J., United Copper Securities* v. *Amalgamated Copper Co.*, 232 F. 574, 578 (C. C. A. 2).

CONCLUSION

The judgment should be affirmed.

Dated May 6, 1974

Respectfully submitted,

SEWARD & KISSEL
Attorneys for Plaintiff-Appellee

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LESTER KISSEL
SAMUEL RUDYKOFF
of Counsel.

Benj. H. Tyrrel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BLH, INCORPORATED, PLAINTIFF-APPELLEE.

AGAINST

HODGE & HAMMOND, INC., DEFENDANT -APPELLANT

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

appellee'S BRIEF

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:.

George Freitag, being duly sworn, deposes and says that he is a mail clerk in the office of BENJ. H. TYRREL and is over the age of twenty-one years.

That on the forenoon of May 8, 1974 on that day your deponent served (3) copies in the above entitled matter addressed to Leland Stuart Beck, 288 Old Country Road, Mineola, New York

by depositing same in the United States Post Office, Church Street Annex, New York City, N.Y. Enclosed in a securely sealed post paid wrapper, addressed as aforesaid and plainly marked "First Class Mail".

George Freitag

Sworn to before me this
8 day of MAY ,1974

Salvatore Mecca

SALVATORE MECCA
NOTARY PUBLIC, State of New York
No. 24-7673745
Qualified in Kings County
Commission Expires March 30, 1976